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April 4, 2006

VIA ELECTRONIC FILING

Hon. Michael L. Orenstein, U.S.M.J.
United States District Court
Eastern District of New York
Long Island Courthouse
100 Federal Plaza
Central Islip, NY 11722-4438

Re: S&L Vitamins v. Australian Gold
05-CV-1217 (JS) (MLO)

Dear Magistrate Judge Orenstein:

We represent S & L Vitamins and Larry Sagarin in the above-captioned matter. We write in response to defendant's March 30, 2006, subpoena to Andrew P. Daniels, CPA. (A copy of the subpoena is attached hereto as Exhibit A.) The subpoena seeks, *inter alia*, financial information concerning S & L Vitamins, Inc., Body Source, Ltd., Larry Sagarin, Laura Fanning (Mr. Sagarin's wife), and Steven Mercadante (President of S & L Vitamins, Inc.).

The subpoena, however, is untimely, and, as such, we have instructed our client to inform Mr. Daniels that he need not release the requested information to defendant. The July 25, 2005, Scheduling Order in this case states that all fact discovery is to be completed by March 31, 2006. (A copy of the Scheduling Order is attached hereto as Exhibit B.) The Scheduling Order further notes the following:

> The discovery completion date specified in any pre-trial order is the last day to serve discovery responses. To be timely, discovery requests must be served sufficiently in advance of the discovery completion date for responses to be served prior to the discovery completion date.

As stated above, the subpoena to Mr. Daniels is dated March 30, 2006. (We are not aware of the date on which it was served pursuant to the Federal Rules of Civil Procedure.) At such a late juncture, the subpoena was hardly served "sufficiently in

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advance of the discovery completion date for responses to be served prior to" March 31, 2006, and, accordingly, the discovery request is untimely.

Even if this Court were to find that the issuance of the subpoena were in compliance with the Scheduling Order, most of the requested information is irrelevant, burdensome or overly broad. We believe, however, that the timeliness issue is dispositive. The discovery cutoff date, as well as the date by which discovery must be served so that responses can be made within the deadline, have now passed. No request was made to extend the discovery deadline, nor would there be a valid reason to do so for defendant, which has been aware of the issues and "players" in this case for more than two years and cannot now be heard to claim that it was only recently alerted to the need for the discovery now being sought.

We are available at the Court's convenience should the Court have any questions concerning this submission or guidance to the parties regarding the scheduling or other aspects of the litigation.

Respectfully submitted,

Ronald D. Coleman

cc: Francis J. Earley, Esquire (via ECF)
Scott D. Matthews, Esquire (via first class mail)

EXHIBIT A

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the

United States District Court

EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC.,

Plaintiff/Counterclaim Defendant,

v.

AUSTRALIAN GOLD, INC.,

Defendant/Counterclaim Plaintiff.

-- X

AUSTRALIAN GOLD, INC.,

Third Party Plaintiff,

v.

LARRY SAGARIN AND JOHN DOES, 1-10,

Third Party Defendant,

-- X

SUBPOENA IN A CIVIL CASE

CASE NUMBER:[1] 05-CV 1217(JS)(ML)

TO: Andrew P. Daniels, CPA
1160 E. Jericho Turnpike #201
Huntington, NY

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
MINTZ LEVIN COHEN FERRIS GLOVSKY AND POPEO, P.C. Chrysler Center 666 Third Avenue New York, NY 10017	

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objections at the place, date, and time specified below (list documents or objects):

See Attached Exhibit A

PLACE	DATE AND TIME
MINTZ LEVIN COHEN FERRIS GLOVSKY AND POPEO, P.C. Chrysler Center 666 Third Avenue New York, NY 10017	**April 13, 2006** 9:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

[1] If action is pending in district other than district of issuance, state district under case number.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designed, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Francis Earley	3/30/06

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Francis J. Earley, Mintz Levin Cohn Ferris Glovsky and Popeo, P.C. - 666 3rd Avenue, New York, NY 10017

(See Rule 45, Federal Rules of Civil Procedure, Parts C&D on Reverse)

AO 88 (Rev. 1/94) Subpoena in a Civil Case

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED BY (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party service the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT A

1. All documents related to work performed on behalf of S&L Vitamins, Inc., Body Source, Ltd., Larry Sagarin, individually, Laura Fanning, individually and Steven Mercadante, individually, from 2000 through the present, including but not limited to all correspondence, tax returns, financial statements, documents and records relating to the persons and entities identified above.

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---X
S&L VITAMINS, INC.

-against

SCHEDULING ORDER
DOCKET# CV05-1217 JS

AUSTRALIAN GOLD, INC.
---X

The above numbered matter has been referred to the undersigned for pre-trial supervision and the preparation of the scheduling order required by Rule 16(b) of the Federal Rules of Civil Procedure.The following schedule is established after consultation with the parties:

Joinder of additional parties are to be completed by 11/30/05

Amend the pleadings by 11/30/05

Any summary judgment motion shall be scheduled for a pre-motion conference no later than 8/1/06

Any other dispositive motion shall be filed by 8/1/06

*All discovery is to be completed by 3/31/06 (all fact discovery) 6/30/06 – all expert discovery including expert depositions. Defendant shall serve its expert report by 4/30/06; plaintiff to serve by 5/31/06.

*The discovery completion date specified in any pre-trial order is the last day to serve discovery responses. To be timely, discovery requests must be served sufficiently in advance of the discovery completion date for responses to be served prior to the discovery completion date.

A final pre-trial conference is to be held 10/20/05 at 11:30 AM

Pre-Trial Order to be submitted and filed with Clerk of the Court by ____________

SO ORDERED.

dated: July 25, 2005

Central Islip,
New York

Michael L. Orenstein

MICHAEL L. ORENSTEIN
UNITED STATES MAGISTRATE JUDGE

Parties shall submit a "highly confidential" protective order by 8/10/05. If not court will issue its own.